Petition

81-1053

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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT M. COUF,
MARY A. BROWN and
DEVELOPMENT
FINANCE, INC.,

Petitioners,

v.

KARLEEN DeBLAKER,
JOHN F. RANKIN, DONALD
WILLIAMS, JOSEPH CARWISE,
H. EVERETT HOUGAN and
PICOT B. FLOYD,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE
THE SUPREME COURT OF THE UNITED STATES

ROBERT M. COUF, MARY
A. BROWN and DEVELOPMENT
FINANCE, INC.,

Petitioners,

vs.

KARLEEN DeBLAKER, JOHN
F. RANKIN, DONALD WILLIAMS,
JOSEPH CARWISE, H. EVERETT
HOUGAN and PICOT B. FLOYD,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review a judgment and opinion adverse to Petitioners. All parties are listed in the caption.

QUESTION PRESENTED FOR REVIEW

Whether the evidence at trial was sufficient to establish violations of Petitioners' civil rights in vested real property and contractual interests so as to cause the setting aside of the jury verdict in their favor to constitute a further violation of their civil rights to a jury trial.

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REFERENCES TO OPINIONS BELOW

The opinion of the Court of Appeals is cited as Couf v. DeBlaker, 652 F.2d 585, Case Number 79-3229, dated the 7th of August, 1981, affirming an order granting judgment not withstanding the verdict of the United States District Court, Middle District of Florida, Tampa Division, styled: Robert M. Couf, et al, vs. Karleen DeBlaker, et al., Case No. 74-391 Civ-T-H. The order and judgment of the District Court were each dated August 16, 1979. The above-referenced opinions are appended.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for which review is sought was dated and entered on August 7, 1981; no motion for rehearing was filed.

Jurisdiction is invoked under the 14th Amendment to the United States Constitution, Title 28 U.S.C. Section 1254, and Rule 17 of the Rules of the United States Supreme Court, because the Court of Appeals has decided an important question of state law in conflict with applicable state law; has decided a federal question conflicting with applicable Supreme Court decisions; and has sanctioned such a departure from accepted judicial proceedings as to call for an exercise of this Court's supervisory power.

APPLICABLE CONSITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment to the United States Constitution:

> In suits at common law, where the value in controversary shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

United States Constitution, Article I, Section 10, Paragraph 1:

> [1]No State shall enter into any treaty alliance or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Title 42 U.S.C., Section 1983, Civil Action for Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights , privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Florida Appellate Rule 5.12:

"(1) When Security Not Required. --When the state or any of its political subdivisions, or any officer, board, commission or other public body of the state or any of its political subdivisions, in a purely official capacity, takes an appeal or petitions for certiorari, the filing of the notice of appeal or the the petition for certiorari as the case may be shall perfect the same and stay the execution or performance of the judgment, decree or order being reviewed and no supersedeas bond need be given unless expressly required by the court."

STATEMENT OF THE CASE

The following reiteration of facts reveals a story of a widow and a developer seeking relief from City officials' efforts to prevent them from lawfully making a profit from the use of their property.

In April of 1973, Petitioner, Development Finance, Inc., purchased a waterfront lot in Clearwater, Florida, with intent to build a high rise condominium. In May of 1974, the corporation contracted to purchase the adjoining lot to the south from Petitioner, Widow Mary A. Brown (now deceased), paying a non-refundable $5,000 earnest money deposit.

The development planned was a then permitted 15-story high rise condominium containing 74 units. Construction loan commitments were obtained, and Petitioner, Robert Couf, personally guaranteed interim financing to maintain the property, pending approval of the project.

According to Couf, prior to entering into the contract to purchase the Brown property, Respondent, Donald Williams, then a City

Commissioner, attempted to purchase the corporation's property. Williams denied this.

Couf approached the City Planning and Building Departments to discuss the development but was told no applications for building permits could be accepted because the Commission was going to downzone the property and all other property within 500' of the waterfront and the Departments had been so instructed by the Commission.

Couf, both by personal appearance before the Commission, and by letter through his attorney, advised the City officials of the obligations of the existing contract with Mary Brown and that he would lose the property if it was downzoned.

Receiving no relief from the City, Petitioners filed a petition for writ of mandamus against the respondents here to require the City to accept the application for building permit.

The State Trial Court issued the writ, and in an extensive order which is appended, required the City and Respondents to accept the

corporation's application. In the order the Court found, inter alia, that the property of Petitioners was fairly surrounded by similar structures as that planned, that the Commissioners had predetermined to deny the application, that the Petitioners had substantially altered their position in reliance on acquisition of a permit, which included contractual arrangements and Respondents acted arbitrarily.

The City immediately appealed, which resulted in automatic supersedeas of the order; the Florida Appellate Rule relating to automatic supersedeas for governmental subdivisions was admitted in evidence in the Federal trial. Pending State appellate action, which resulted in a per curiam affirmance of the Trial Court order, the corporation lost its financing and its property, as predicted.

In July 1974, Petitioners filed suit under the Fourteenth Amendment and Title 42 U.S.C. 1983, alleging a conspiracy to deprive the Petitioners of their property rights, including impairment of contractual obligations as well

as other property rights. Jurisdiction was alleged under the 14th Amendment as a Federal question and Title 28 U.S.C. 1343.

Motions to dismiss and for summary judgment were denied, and the case was tried before a jury.

During the trial, it was revealed in addition to the above facts that Respondent, Commissioner Williams, had a 20% interest in a later constructed 14-story high rise of 256 units in the described moratorium zoned area being only two blocks north of the Petitioners' property within five hundred feet of the waterfront. (Further the Appellate Court found noteworthy that a building permit was issued after the moratorium on other property in the moratorium area on an application made prior to the moratorium.)

The Respondents claimed in their testimony that this was in an exempt "core area". However, neither the motion to downzone nor the ordinance contained any reference to this suddenly materializing exempt area to the benefit

of the Commissioners.

The jury was instructed on the law of conspiracy and that the findings of the State Court Judge were binding upon the jury, and told them what these findings were. In sum, they were told the State Court found the Respondents were predetermined to deny the Petitioners a permit, that Petitioners had altered their financial position in reliance on the zoning and that the land was fairly surrounded by structures similar to that proposed by Petitioners, and further that they had entered into contractual agreements between themselves.

A verdict was returned against all parties except Bergmann and Blanton for $70,833.33 for Couf and the Corporation, and $75,000.00 for Mary Brown.

The Respondents filed motions for new trial, or, alternatively, for judgment notwithstanding the verdict, which was granted on the 16th day of August, 1979, with judgment accordingly. Both are appended.

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. Upon the briefs and oral argument, that Court rendered the appended opinion adverse to the Petitioners. This petition is taken to seek review of that decision.

ARGUMENT FOR ISSUANCE OF WRIT

The Petitioners presented sufficient evidence to the jury to sustain the jury's vertict; the action of the trial court in setting aside the verdict, and the action of the Court of Appeals in affirming resulted in the Petitioners being not only deprived of their vested property rights but also their right to trial by jury as guaranteed by the Seventh Amendment to the United States Constitution.

The appended opinion for which review is sought decides the question of collateral estoppel and res adjudicata in a way conflicting with the decision of this Court relating to its application in civil rights cases in Allen v. McCurry, 101 S.Ct. 411, 66 L.Ed.2d 308, by refusing to apply that principle to State Court findings of arbitrary and capricious actions on the part of the Respondents.

It also decides an important state question of law in conflict with applicable State law, by concluding that the zoning actions of the

Respondents as Commissioners for local government were legislative in nature contrary to Andover Development Corporation v. City of New Smyrna Beach, 528 So.2d 231, certiorari denied by Supreme Court of Florida, 341 So.2d 290.

The challenged opinion has sanctioned a departure from the accepted and usual course of judicial proceedings by setting aside a civil rights verdict in favor of Respondents in the face of evidence sufficient to sustain the verdict, thereby denying them relief supplemental to State relief as announced in principle by this Court in McNeese v. Board of Education for Community Unit School District 187, 323 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622.

As noted in the Statement of the Case, the Petitioners received no relief at all, because the State Court relief was nullified by the appeal of the State Court Judgment, which suspended the relief granted until the Petitioners lost their property.

Therefore, as shown above, the decision sought to be reviewed meets three of the classical reasons provided by the Rules of the

Supreme Court independently sufficient to support issuance of the Writ of Certiorari.

The points raised in support are so interrelated, and the following is intended to relate to all.

First of all, under Florida law and Federal law the Petitioners acquired federally-protected vested rights in their efforts to develop the property in conformance with existing zoning. See, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322; City of Miami Beach v. First Trust Company, 45 So.2d 681. There efforts included contractual obligations which Respondents specifically knew would be and in fact were impaired by the downzoning and by substantial and material expenditures in reliance on the existing zoning. These elements were not rebuttable at the federal trial because they were the subject of a prior final State Court finding in litigation involving identical parties and subject matter. See Allen v. McCurry, supra.

In City of Miami Beach v. First Trust

Company, supra, the city had refused to rezone the 8.13 acre Firestone Estate from single family to multi-family when the Estate was surrounded by multi-family dwellings. The Florida Supreme Court affirmed a trial judge's ruling that the single family zoning was arbitrary and unreasonable because the property was, as here, fairly surrounded by structures similar to the proposed use.

This is not a case of guiding development of a land area, for development had already taken place. The Petitioners were prevented from developing in conformance with established development because of the conspiracy.

To briefly summarize the evidence pointing to the conspiracy, the jury heard:

(a) Respondent Commissioner Williams tried to buy the Petitioners' property before any proposal to downzone or refusal to accept applications for permits.

(b) Bergmann and Blanton of the Planning and Building Departments of the City told Couf downzoning was going to occur even before the public hearings.

(c) After knowing of the Petitioners' rights, the Respondent Commissioners directed the Planning Department to recommend downzoning (not to study and recommend in accordance with the study).

(d) No legal opinion was requested.

(e) Respondent Williams acquired a building permit, after the downzoning on property within the downzoned area within two blocks of Petitioners' property. Inexplicably, this property became exempt from the ordinance, while the Petitioners' did not.

(f) The Respondents irrevocably predetermined to deny Petitioners a permit (this again by way of the State Court findings), which was in effect a de facto downzoning of the Petitioners' property without hearing; the hearing thereafter being meaningless.

(g) The Petitioners' property was fairly surrounded by structures similar to that proposed by Petitioners.

(h) A high rise building permit was issued during the moratorium for a piece of property

other than that described in (e) which property was in the zoned area and only one hundred yards from Petitioners property.

The only conclusion the jury could lawfully reach was that the actions of Respondents were at least arbitrary and capricious, especially in view of the critical binding fact, i.e., the Petitioners' property was surrounded by structures similar to that proposed.

Perhaps even stronger than arbitrary and capricious is the obvious conclusion of the jury that the Petitioners' injury was the result of a conspiracy.

In Words and Phrases, at 3A W & P - 102, "Arbitrary and Capricious," (pocket part), we find:

> "The terms 'arbitrary and capricious action' when used in connection with determining validity of action of municipal zoning authorities, means willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case, and where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it might be believed that an erroneous conclusion had been reached. Milwaukie Co. of Johovah's Witnesses v.

Mullen, 330 P.2d 5, 12, 214 Or. 281."
(Emphasis Supplied).

The Respondents, in effect, reverse spot zoned Petitioner's property out of the use to which the property fairly surrounding it had been put.

The State decision finding Respondent acted arbitrarily required a directed verdict in favor of Petitioners if this courts recent holding in Allen v. McCurry, supra, is to be honored. A fortiori it did not permit the setting aside of a unanimous jury verdict in Petitioners favor.

A detailed comparison of the Florida State holding as affirmed on appeal, the holding of this Court in Allen v. McCurry, supra, and the holding of the Court of Appeals 5th Circuit will reveal that a strong argument can be made for summary reversal without oral argument. The error is of consequence because the opinion already threatens the rights of another civil rights applicant in the Northern District of Florida, Tallahassee Division, case of Becker v. Alachua County GCA 80-0076 and will damage the rights of many others.

CONCLUSION

The District Court and the Court of Appeals erroneously held that there was no substantive evidence to support the unanimous jury verdict in favor or Petitioners. Such Federal Court in direct contravention to this Court's recent holding in Allen v. McCurry, supra, that a state courts findings on the same subject matter in litigation involving the same parties can't be collaterally attacked held that the action of the Respondents was not arbitrary and capricious, even though the State Court had already found contrarily. The State's decision was based on the concept settled in City of Miami Beach v. First Trust Company, supra that the property, being fairly surrounded by similar structures, left no possible conclusion but that Petitioners were singled out for discriminatory treatment and that the Respondents' actions were arbitrary.

This Court has held that Section 1983 was intended to provide relief supplemental to that provided by State remedies. McNeese v. Board

of Education for Community Unit School District 187, supra. This is what Petitioners are seeking.

This Honorable Court should issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and, upon complete review, reverse the Appellate Court's judgment, with directions to order reinstatement of the jury verdict in favor of Petitioners or as a minimum give petitioners that jury trial which has been denied.

Respectfully submitted,

James G. Mahorner

James G. Mahorner
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Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ~~5th~~ 1st day of ~~November~~ December, 1981, three copies of the Petition for Writ of certiorari to the United States Supreme Court were mailed, postage prepaid to Oscar Blasingame and Stephen Chamblis of Greene, Mann, Rowe, Stanton, Mastry, and Burton, P.O. Box 3542, St. Petersburg, Florida 33713, and to Thomas A. Bustin, City Attorney, City of Clearwater, P.O. Box 4748, Clearwater, Florida 33518.

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Appendix

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Respondents.

APPENDIX

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APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

No. 79-3229

ROBERT M. COUF, MARY A. BROWN, AND
DEVELOPMENT FINANCE, INC.,
Plaintiffs-Appellants,

v.

KARLEEN DeBLAKER, et al.,
Defendants-Appellees.

(Aug. 7, 1981)

Developer, who wanted to build condominium project, and owner of adjacent property on which developer wanted to build part of project brought section 1983 action against city officials. The United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., entered judgment notwithstanding vertict, and plaintiffs appealed. The Court of Appeals, Henderson, Circuit Judge, held that: (1)

state court decision holding that city's "legislative representatives" abused their discretion in refusing to give developer building permit for condominium project did not establish, for purposes of section 1983 action brought in federal court, that "down zoning," which occurred after the 1983 action was brought, was irrational; (2) absent showing that city's action of "down zoning" property on which developer planned condominium project had so great an impact on value of developer's property and on adjoining property developer sought to acquire as to constitute compensable taking of developer's property and of adjacent property, developer and owner of adjacent property were not entitled to recover from city officials for taking private property for public use without just compensation in violation of Fifth Amendment; and (3) absent showing of improper pecuniary interest of one city commissioner in zoning decision "down zoning" property on which developer sought

to build condominium project, and absent showing that city zoning commission acted out of malice toward developer in making such decision, due process rights of developer and owner of adjacent property were not violated on basis of alleged procedural flaws in zoning commission's decision-making process.

Affirmed.

1. Judgment 828(1)

State court determination of federal issue, when made after full and fair hearing, controls in subsequent section 1983 action in federal forum. 42 U.S.C.A. §1983.

2. Judgment 828(3.24)

State court decision holding that city's "legislative representatives" abused their discretion in refusing to give developer building permit for condominium project did not establish, for purposes of section 1983 action brought in federal court, that "down zoning," which occurred after the

1983 action was brought, was irrational. 42 U.S.C.A. § 1983.

3. Eminent Domain 2(1.2)

Absent showing that city's action of "down zoning" property on which developer planned condominium project had so great an impact on value of developer's property and on adjoining property developer sought to acquire as to constitute compensable taking of developer's property and of adjacent property, developer and owner of adjacent property were not entitled to recover from city officials for taking private property for public use without just compensation in violation of Fifth Amendment. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 5.

4. Zoning and Planning 610

Federal review of zoning disputes should be limited to single issue of whether action of zoning commission is arbitrary and capricious, having no substantial relation to general welfare.

5. Constitutional Law 278.2(2)

Absent showing of improper pecuniary

interest of one city commissioner in zoning decision "down zoning" property on which developer sought to build condominium project, and absent showing that city zoning commission acted out of malice toward developer in making such decision, due process rights of developer and owner of adjacent property, which developer sought to purchase for part of project, were not violated on basis of alleged procedural flaws in zoning commission's decision-making process. U.S.C.A. Const. Amend. 14, § 1; 42 U.S.C.A. § 1983.

Jack F. White, Jr., St. Petersburg, Fla., for Brown.

Michael L. Kinney, Tampa, Fla., for Development Finance, Inc.

Harrison, Greene, Mann, Davenport, Rowe & Stantan, Oscar Blasingame, Stephen C. Chumbris, St. Petersburg, Fla., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges.

HENDERSON, Circuit Judge:

The plaintiffs appeal from the entry of a judgment notwithstanding the verdict in favor of the defendants. The suit had its genesis in a Florida zoning dispute, but beyond that there is little agreement among the parties and the issues presented are not clearly delineated. Consequently, it is necessary at the outset to briefly summarize the underlying facts and the history of the litigation.

In 1972 the city of Clearwater, Florida adopted a comprehensive land use plan to guide the long-term growth of the city. Subsequently Pinellas County, in which Clearwater is located, formulated a county-wide plan which was approved by the city in May of 1973 and became effective in January of 1974. The county plan envisioned that future residential development would be limited to no more than thirty

dwelling units per acre, except in a core central business district.

On April 30, 1973, Development Finance, Inc. (hereinafter referred to as "DFI") purchased a piece of waterfront property on Turner Street in Clearwater (hereinafter referred to as "the Turner lot"). The parcel was zoned for high density residential use, which meant that it would support up to fifty-four units per acre, assuming the availability of sufficient parking and other amenities. DFI proposed to build twenty-five condominiums in a fifteen or sixteen story building, and proceeded to the point of securing a building permit.

DFI was unable to obtain construction financing, however. Believing that a larger project would be more attractive, Robert Couf, DFI's president and sole shareholder, decided to expand and build seventy-four condominiums. The larger building would have required more ground space, so Couf agreed to buy an adjoining lot, carrying the

same zoning classification, from Mary Brown (hereinafter referred to as "the Brown lot").

Late in May of 1974, Couf, who did not know of the new county land use plan, made an appointment to discuss his venture with Paul Bergmann, the City Planning Director. Unfortunately for Couf, on June 6, 1974, before the scheduled meeting, the City Commission of the City of Clearwater (hereinafter referred to as the "City Commission") instructed the Planning Department to recommend that all property within 500 feet of the City's waterfront be "down-zoned"[1] and to refuse to accept any applications for building permits until after making its recommendation.[2]

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1 Although not defined in this record or in Webster's New Third International Dictionary we understand this term, in the context of this case, to mean the reduction of the number of building units which may be constructed in a given area.

2 Applications pending on June 6, 1974, were not affected.

On June 10, 1974, Bergmann met with Couf and told him of the permit moratorium. Despite numerous conferences with Bergmann and Mayor Hougen, Couf was unable to procure a permit. At the City Commission's July 1, 1974 meeting the City Manager recommended that the Turner and Brown lots be downzoned to the medium density residential classification (i.e., twenty-four units per acre) in view of the pending review of the entire waterfront. Couf spoke at the meeting, but the City Commission nonetheless ordered the Planning Department to move forward on the City Manager's recommendation and prohibited it from accepting applications for building permits.[3]

On July 19, 1974, Couf, Brown and DFI filed this action in federal district court,

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[3] Specific findings on this matter were made in the state court proceedings referred to below.

seeking damages pursuant to the provisions of 42 U.S.C.A. §§ 1983, 1985 and 1986. The plaintiffs' theory of recovery developed over the course of the trial, cf. F.R.Civ.P. 15(b) (amendment to conform to evidence), and appears to focus on the charge that the defendants, who are four city commissioners, the mayor, the city manager and the planning and building directors, but not the city itself, deprived them of their property without due process of law.[4]

Then, on July 31, 1974, Couf and Brown filed a petition for mandamus in the Circuit Court of the State of Florida for Pinellas County to require the city to issue a building permit. On September 27, 1974, the court issued a writ of mandamus directing the city and its officials to accept a building permit application for consideration under the existing zoning classification (i.e., fifty-

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[4] The complaint also alleged that the defendants conspired to "impair the obligations of the contract" between Brown and Couf. This contention was not pursued and is not before us.

four units per acre.)[5] The final order granted Couf thirty days to submit his application for the permit.

Because it was clear in June that an application would have been rejected, the state court excused Couf's failure to then file for a permit. The court's order noted that "[t]he apparent intent, purpose and design of the City of Clearwater to 'down zone' the property in question ... is to be praised," Order at 5-6, but held that because the plaintiffs had "substantially altered their position in reliance upon" the availability of a permit under the old zoning classification the city's "legislative representatives" had abused their discretion. Concluding that the constructive applica-

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5 Apparently the city and county comprehensive plans were only guides, cf. City of Gainesville v. Cone, 365 So.2d 737 (Fla.App. 1973) (Gainesville, Fla. plan), and as a result of the state court litigation downzoning was not finalized until March 17, 1975, when City Commission adopted an ordinance revising the zoning atlas.

tion was denied without good legal cause, the court held that the City Commission's decision was arbitrary.

On October 25, 1974, twenty-eight days after the writ issued, the city and the other defendants appealed, thereby superseding operation of the writ, Fla.App.R. 5.12. The order was subsequently affirmed without opinion. DeBlaker v. Couf, 319 So.2d 209 (Fla.App.1975). Couf never applied for a permit as provided for in the state court order, and the project failed to materialize.

In the federal action, Mrs. Brown sought to recover the cost of her state court litigation and damages for the decreased value of her property.[6] Couf sued for his lost profit on the development, as well as his interest in the Turner lot, which he forfeited when the mortgage was eventually foreclosed. But cf. Southpark Square Ltd. v. City of

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[6] It appears that the Couf-Brown purchase agreement was contingent on Couf's obtaining a building permit.

Jackson, 565 F.2d 338, 343 (5th Cir. 1977), cert. denied, 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978) ("a city would be unduly hamstrung if its permit decision subjected it to potential liability on the basis of financial arrangements independently made by property owners affected by those decisions.").

Although the parties treat this case as involving a change in zoning classification, all the defendants have done before the federal action commenced was communicate their intention to deny a building permit. We are not sure that the denial of a building permit can be the predicate for a federal cause of action, see Southpark Square Ltd., but even if it can we agree that it cannot support a recovery in this case. As the district court's final ordered stated,

> Assuming that some duty owed to the Plaintiffs was breached by Defendants under state law, federal law or the United States Constitution, that breach was fully remedied by the immediate state court order which enjoined Defendants to accept and consider Plaintiffs' application for a building permit under the

> existing ... zoning classification. At that point Plaintiffs had been granted all the relief to which they were entitled.

Order at 6.

On the other hand, when downzoning finally came, it had a more lasting effect on the plaintiffs and their property. Throughout this appeal the plaintiffs seem to suggest that downzoning was accomplished with the actions the defendants took in the summer of 1974, although as we have noted the necessary ordinance was not enacted until well after this suit was initiated, note 5, supra. This lack of precision is unfortunate, but whenever it actually happened, the zoning change cannot support recovery any more than did the permit denial.

Unless an ordinance or classification has the purpose or effect of injuring a protected group or restricting a protected activity, the Constitution places very few substantive limitations on local zoning. Cf. Schad v. Borough of Mount Ephraim, ---- U.S. _____, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981)

(exotic dancing); Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (family living). Such regulation must be sustained "if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property." Schad, _____ U.S. at _____. 101 S.Ct. at 2182; see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).[7]

> [L]ocal zoning is a quasi-legislative procedure, not subject to federal juridicial consideration in the absence of arbitrary action.
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> . . . .
>
> . . . A zoning commission is a quasi-leg-

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[7] The constitutional source of this protection can be the equal protection clause, Village of Belle Terre v. Boraas, 416 U.S. 1, 8, 94 S.Ct. 1536, 1540, 39 L.Ed.2d 797, 803 (1974), the due process and just compensation clauses, Moore, 431 U.S. at 514, 97 S.Ct. at 1943, 52 L.Ed.2d at 546, or perhaps all three, Monaghan, Of "Liberty" and "Property", 62 Cornell L.Rev. 405, 405-06 (1977).

> islative body. It is not required to make findings of fact or state the reasons for the action taken. Its actions are entitled to a presumption of validity. The only question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare.

South Gwinnett Venture v. Pruitt, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974). The power to channel growth through zoning is "one of the firmest and most basic of the rights of local control." Stansberry v. Holmes, 613 F.2d 1285, 1288 (5th Cir.), cert. denied, _____ U.S. _____, 101 S.Ct. 240, 66 L.Ed.2d 112 (1980), and where a community expresses that power as part of "a rational and understandable effort to deal with a perceived evil," id.; at 1289, a federal challenge cannot be sustained in the district court. Id.; Blackman v. City of Big Sandy,

507 F.2d 935 (5th Cir. 1975); South Gwinnett Venture; cf. Developments in the Law -- Zoning, 91 Harv.L.Rev. 1427, 1443-62, 1550-78 (1978) (substantive limitations on zoning). See generally L. Tribe, American Constitutional Law, §§ 8-7, 16-3 (1978). Certainly, the protection of the city shoreline was of critical importance to the City Commissioners. Whether they chose the best way to regulate development is not for us to decide, for that judgment was their prerogative. Zahn v. Board of Public Works, 274 U.S. 325, 328, 47 S.Ct. 594, 595, 71 L.Ed. 1074, 1076 (1927); Stansberry, 613 F.2d at 1289; Blackman, 507 F.2d at 936.

[1,2] The plaintiffs have not explained why the downzoning is not rationally related to the city's interests. Instead, they argue that the state courts found the action arbitrary and irrational, and that this finding was binding in the federal litigation.[8]

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[8] Although the state mandamus proceeding began after the federal action commenced, it was completed long before the federal case went to the jury.

This reasoning is sound to a point, for it is obvious that a state court determination of a federal issue, when made after a full and fair hearing, controls in a subsequent § 1983 action in a federal forum. Allen v. McCurry, _____ U.S. _____, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). See generally, Developments in the Law -- Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1330-54 (1977).[9] But, as the district court recognized in granting the judgment n. o. v., the state courts never found the City Commission's actions to be arbitrary in the sense relevant to this case. It is true that state trial judge said that downzoning "cannot be arbitrarily and con ficatorily imposed upon the Plaintiffs by the simple means of verbal directives ...."

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[9] An interesting question is whether the defendants would have been entitled to summary judgment in view of the plaintiffs' failure to raise these claims in state court. See Allen at notes 5 and 10, cf. Southpark Square Ltd. (relevance of state remedies). We have no occasion to reach this problem because the defendants failed to affirmatively plead this defense, if it is a defense, as required by F.R.Civ.P. 8(c).

Order at 6-7 (emphasis supplied). But it is abundantly clear that he meant that the City Commission had violated state procedural rules. It is impossible to read the order as holding that the zoning classification was irrational. In fact, it says just the opposite.[10] As the district court saw it, entirely different issues were involved in the state and federal actions. The inflections of the word "arbitrary" used in the state and federal court opinions may be a bit confusing, but are not controlling.

[3] The second relevant substantive restriction on the zoning power is the fifth amendment's injunction against taking pri-

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[10] See e. g., Order at 5 ("Any action by public officials to terminate the proliferation of man made mountains of concrete, glass and steel, along our shore lines is to be commended."), 5-6 ('The apparent intent, purpose and design of the City of Clearwater ... is to be praised.") and 6 ("It would appear that the Defendants on some recent one day past, took startled note of Clearwater's downtown bay front and suddenly decided that enough was enough. We wish it could be so.").

vate property for public use without just compensation. It is not certain that the plaintiffs meant to ground their complaint on this amendment to the Constitution, but their presentation has been far from clear and their complaint can be read as taking that stance. Leaving aside the substantial issue of the immunity of individual defendants from liability for a taking, see Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), reh. denied, 649 F.2d 336 (5th Cir. 1981), we are satisfied that even if the plaintiffs properly asserted the claim they were not entitled to recover on it. The record is devoid of any evidence that the city's action had so great an impact on the value of the plaintiffs' property as to constitute a compensable taking. See Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); Hernandez.

Having concluded that the City Commission's eventual classification was free of substantive fault, we next examine the procedures followed in making that decision.

The first section of the fourteenth amendment provides, in pertinent part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law ...." The accepted understanding of this section has, to say the least, evolved considerably in the past few years. See generally, K. Davis, 2 Administrative Law Treatise §§ 11:1-:3 (2d ed. 1979); L. Tribe, American Constitutional Law § 10-12 (1978); Monaghan, Of "Liberty" and "Property", 62 Cornell L.Rev. 405 (1977); Van Alstyne, Cracks in "The New Property", 62 Cornell L.Rev. 445, 457-70 (1977). For our purposes it is enough to say that we must investigate whether any constitutionally protected interests were at stake, and if there were, what procedural safeguards the City Commission was required to observe

in making decisions affecting those interests. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); compare Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), with Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); see K. Davis, supra, § 11:1 at 341-43, § 11:3 at 349; L. Tribe, supra, § 10-12 at 533ff. Here, the protected interest was real estate.

[4] Our en banc opinion in South Gwinnett Venture explicitly holds that "The only question which federal district courts may consieer is whether the action of the zoning commission is arbitrary and capricious, having no substantial relatin to the general welfare." 491 F.2d at 7 (emphasis supplied). The only conclusion we can draw from this statement is that federal review of zoning disputes should be limited to a single issue. In that respect, as stated earlier,

this action was not substantively invalid.

Our opinions repeatedly characterize local zoning decisions as "legislative" in nature. Hernandez; South Gwinnett Venture; Higginbotham v. Barrett, 473 F.2d 745, 747 (5th Cir. 1973). If this word is used advisedly--as it appears to be--then the plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here. See Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372, 375 (1915), discussed in K. Davis, supra, § 12:2 at 412; cf. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976) (referendum). See generally L. Tribe, supra, § 10-7 at 502 and note 4; Developments in the Law--Zoning, 91 Harv.L.Rev. 1427, 1508-13 (1978). Most of the cases developing procedural limitations on government action involve challenges to

administrative decisions. The plaintiffs do not cite a single federal case that even discusses procedural requirements for zoning matters, let alone one that reverses a zoning decision because of a procedural failure. See Developments in the Law--Zoning, 91 Harv.L.Rev. 1427, 1502-49 (extensive discussion of cases).

At least one case decided after South Gwinnett Venture suggests that the fairness of the procedures by which a zoning classification is made--as opposed to the propriety of the classification itself--is a subject fit for review in the federal courts. Stansberry, 613 F.2d at 1289 and note 9. There is no necessity to determine whether this judicial expression flies in the face of South Gwinnett Venture, however, because the plaintiffs did not produce any evidence of procedural infirmities.

[5] Only two allegations of procedural flaws can be discerned from even the most dedicated and sympathetic examination of

the pleadings and record.[11] First, that one commissioner had a pecuniary interest in the zoning decision, and, second, that the City Commission acted out of malice toward Couf. The only evidence cited by the appellants to support the charges is that Commissioner Williams once attempted to buy the Turner lot from Couf. We have studied the record, and there is no more. Even if

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[11] The plaintiffs seem to urge that the defendants' violation of Florida administrative law provides a predicate for § 1983 recovery. The state court litigation established such a violation, but not every infraction of state law constitutes interference with a constitutionally protected interest. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Specifically, "although a Due Process Clause liberty interest may be grounded in state law that places substantive limits on the authority of state officials, no comparable entitlement can derive from a statute that merely establishes procedural requirements." Cofone v. Manson, 594 F.2d 934, 938 (2d Cir. 1979); accord, Bills v. Henderson, 631 F.2d 1287, 1298 (6th Cir. 1980). This procedure-substance distinction was made in Bishop v. Wood, 426 U.S. 341, 345, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684, 690 (1976), but it is not certain what significance the Court attached to it. See discussion in Monaghan, Of "Liberty" and Property", 62 Cornell L.Rev. 405, 439-40 (1977).

we assumed that a federal cause of action could be based on proof of bad faith and that the question of the motivation of the defendants was one for the fact finder, there simply is not enough evidence to create a jury issue, Boeing Co. v. Shipman, 411 F.2d 365, 373-77 (5th Cir. 1969) (en banc). It follows from the foregoing that the district court was correct in granting the defendants' motion for judgment notwithstanding the verdict.

AFFIRMED.

APPENDIX II

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF FLORIDA - TAMPA DIV.

ROBERT M. COUF, MARY A. BROWN AND DEVELOPMENT FINANCE, INC.	*	
		CIVIL ACTION
vs.	*	FILE NO. 74-391-Civ-T-H
KARLEEN DeBLAKER, JOHN F. RANKIN, DONALD WILLIAMS, JOSEPH L. CARWISE, H. EVERETT HOUGEN, PICOT FLOYD, PAUL BERGMANN and EDWIN BLANTON.	*	

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Wm. Terrell Hodges, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that:

1. Upon Order of the Court the judgment on the Jury verdict entered November 8, 1978, is vacated, and

2. That the Defendants' Motion for Judgment notwithstanding the verdict is GRANTED and Judgment is hereby entered in favor of the Defendants KARLEEN DeBLAKER, JOHN F. RANKIN, DONALD WILLIAMS, JOSEPH L. CARWISE, H. EVERETT HOUGHEN and PICOT FLOYD against

the Plaintiffs ROBERT M. COUF, MARY A. BROWN and DEVELOPMENT FINANCE, INC., and that the Defendants KARLEEN DeBLAKER, JOHN F. RANKIN, DONALD WILLIAMS, JOSEPH L. CARWISE, H. EVERETT HOUGEN and PICOT FLOYD recover of the Plaintiffs ROBERT M. COUF, MARY A. BROWN and DEVELOPMENT FINANCE, INC. their costs of action.

3. That the Plaintiffs take nothing, that the action be DISMISSED on the merits as to Defendants PAUL BERGMANN and EDWIN BLANTON, and that the Defendants PAUL BERGMANN and EDWIN BLANTON recover of the Plaintiffs ROBERT M. COUF, MARY A. BROWN and DEVELOPMENT FINANCE, INC., their costs of action.

Dated at Tampa, Florida, this 16th day of August, 1979.

/s/ Wesley R. Thies
CLERK OF COURT

By /s/ John F. Gay
DEPUTY CLERK

APPENDIX III

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR
PINELLAS COUNTY

CIRCUIT CIVIL NO. 74-6505-14

ROBERT M. COUF and MARY A. BROWN,

Plaintiffs,

vs.

KARLEEN DeBLAKER, JOHN F. RANKIN, DONALD WILLIAMS, JOSEPH L. CARWISE, H. EVERETT HOUGEN, PICOT B. FLOYD, PAUL BERGMANN, EDWIN BLANTON and CITY OF CLEARWATER, a Municipal Corporation,

Defendants.

FINAL ORDER

This cause came on for final hearing on September 12, 1974, in accordance with notice furnished by the Plaintiffs to the Defendants on or about August 22, 1974. All of the parties appeared either personally or through their duly designated and appointed agents, and the attorneys for the respective parties appeared, presented their arguments, their exhibits, and examined and cross-examined

the various witnesses called on behalf of both sides to this controversy. This Court heard and considered the testimony of the various witnesses called by the parties; this Court has examined and considered all of the various exhibits introduced into evidence by the parties; this Court has read and considered the various authorities presented by the attorneys for the parties in support of their respective positions; this Court has received and considered the argument of the attorneys for the respective parties presented both orally and by written memoranda presented subsequent to the termination of the hearing.

On or about the 31st day of July, 1974, this Court entered its Alternative Writ of Mandamus requiring the Defendants to issue to the Plaintiffs certain "necessary" permits for the construction of certain apartment buildings or to show cause why the said permits should not be so issued. The return dates on the Alternative Writ of Mandamus

granted by this Court was August 8, 1974. Prior to that return date the Defendants filed their Motions to Quash and Dismiss, to Strike, and to Continue. Upon hearing on August 8, 1974, this Court denied the Defendants' Motion to Quash and Dismiss Court I of Plaintiffs' Petition and granted Defendants' Motion to Dismiss Count II of Plaintiffs' Petition, denied in part and granted in part Defendants' Motion to Strike and denied Defendants' Motion to Continue. Further on August 8, 1974, this Court granted the Petitioners' Motion to Amend Petition by Adding Party Plaintiff. Thereafter on August 20, 1974, following a hearing held on August 16, 1974, this Court entered its Order temporarily restraining and enjoining the Defendants from proceeding with any zoning or re-zoning of the property which is the subject matter of this action. This injunction resulted from the presentation by Plaintiffs' counsel of a notice of public hearing dated August 8, 1974, issued by the

Planning and Zoning Board of the City of Clearwater, Florida, indicating a proposed "down zoning" of the subject property from RM-54A to RM-24.

Thereafter on August 27, 1974; the Plaintiffs filed their amended Count II of their Petition and the Defendants by their answer filed on September 11, 1974, simply denied all of the allegations contained in Plaintiffs' Petition. The Defendants did not allege any affirmative defenses. The Defendants further filed on September 6, 1974, a Motion to Drop Parties Defendant to-wit all of the individual Defendants save the Corporate Defendant, City of Clearwater. At the time of the final hearing, the Defendants again moved to quash the Alternative Writ of Mandamus and to deny the injunction sought by the Plaintiffs. The Court at that time reserved judgment as to the Defendants Motion to Drop Parties Defendant and as to the Defendants' Motion to Quash and this Court now by virtue of this Order hereby denies each and all of the said Motions raised by the

Defendants at the time of the final hearing.

It is appropriate at this time to make the following findings of fact from the evidence, testimony and arguments presented by the respective parties.

First, it is apparent, and found to be fact, that the Plaintiffs did not pursue and perform all of the pre-requisites for obtaining building permits which are required by the city code of the City of Clearwater, Florida. The Petitioners never submitted a specific application for a building permit as required nor did the Petitioners submit the detailed complete building plans, in triplicate, which are required prior to the consideration by the Defendants of an application for a building permit.

Second, it is apparent, and found to be fact, that the Plaintiffs were given just and persuasive cause to believe that the presentation of an application for a building permit together with the detailed complete building plans as required would be useless and that

the Defendants had theretofore irrevocably committed themselves to a denial of the Plaintiffs proposed application.

Third, it is apparent, and found to be fact, that the Plaintiffs, faced with the prospect of performing a useless act, did thereafter file this action before this Court. Neither the law nor this Court requires the performance of a useless act in order to invoke its jurisdiction.

Therefore the Court feels that the case sub judice is an exception to the long standing and well recognized legal maxim that a Writ of Mandamus should not issue when any administrative procedures are left undone or when all administrative remedies are not exhausted.

This Court recognizes that it cannot substitute its judgment for that of the City Commission of the City of Clearwater, Florida. The duly elected commissioners, all of whom are parties to this action, are the legislative representatives of the citizens of

the City of Clearwater and as such their actions, decisions, and policies, cannot be judicially directed nor erased unless it is clearly shown that they have abused the discretion granted their office. This Court can require the City of Clearwater to act but the nature and particularity of such action must be left to its own legislative judgment and discretion.

At all times pertinent to the considerations herein, the land which is the subject matter of this suit has been zoned RM-54A which is a high density multi-family zoning. This zoning classification would allow the construction of the improvements which are the apparent intention of the Plaintiffs providing, however, that the improvements conform to all other applicable building codes, requirements and provisions existing in the City of Clearwater. Therefore it follows that this Court has the authority to compel the Defendants to perform an act to-wit the acceptance of an application from

the Plaintiffs for a building permit for improvements to their property in accordance with existing zoning regulations. It further follows that if the Plaintiffs' application for a building permit does in fact fulfill all of the requirements for improvements allowed under the existing zoning, this Court could compel the City of Clearwater to then issue the desired building permits if the same were refused. However the determination of whether or not the building plans and specifications fulfill existing zoning requirements is to be left to the judgment and discretion of the City of Clearwater and the Court will not interfere unless it can be shown that its judgment and discretion have been abused. Therefore this Court clearly can compel the Defendants to accept, consider, and process the Plaintiffs' application for a building permit in accordance with the now existing zoning classification of the Plaintiffs' property, to-wit RM-54A. Thereafter if the Plaintiffs' application for

a building permit is subsequently denied and the denial was founded upon the sound discretion of the Defendants and if the denial was shown to be for good cause based upon a substantial relationship to the health, morals, welfare, or safety of the community, then such denial would no doubt be affirmed. If, however, the denial was capricious, arbitrary, confiscatory, or the product of a demonstrable abuse of the Defendants' discretion, then the denial would no doubt be overturned.

All of the above would, the Court is sure, be agreed upon and stipulated by all of the parties to this action. The real issue in this case and the crux of the controversy before this Court is whether or not the Defendants were unalterably predetermined to deny Plaintiffs' application for a building permit under the existing RM-54A zoning classification. From all that we have seen, read and heard, the Court feels this to be a fact. The evidence and testimony presented by the Plaintiffs in support of their conten-

tion that the Defendants were unalterably committed to the denial of their application for a building permit was neither substantially nor successfully rebutted.

Any action by public officials to terminate the proliferation of man made mountains of concrete, glass and steel, along our shore lines is to be commended. The apparent intent, purpose and design of the City of Clearwater to "down zone" the property in question (as evidenced by the notice of the Planning and Zoning Board of the City of Clearwater dated August 8, 1974) is to be praised. This very Court has in the past upheld the actions of the Defendants in other cases involving the salvation of our sky line. However those cases were materially and substantially different from the case at hand. In this case the Plaintiffs' land is fairly surrounded by structures which are similar in nature and height to the Plaintiffs' apparent intended improvements. Indeed during the trial of this cause the Defendants admitted that building permits had been issued for high

rise building in excess of ten stories on property less than one hundred yards from that of the Plaintiffs'.

It is the finding of this Court that the Plaintiffs have materially and substantially altered their position in reliance upon the acquisition of a building permit under the present RM-54A zoning. The Plaintiffs have expended great sums of money, the Plaintiffs have volunteered the charitable donation of present improvements on their land which have high historical value, and the Plaintiffs have entered into contractual agreements between themselves in reliance upon the availability of a building permit under the existing RM-54A zoning classification. The Plaintiffs have pursued their intentions openly and in good faith and the Defendants either knew or should have known of those intentions. It would appear that the Defendants on some recent one day past, took startled note of Clearwater's downtown bay front and suddenly decided that enough was enough. We wish it could be so.

The right of a land owner to use his property for whatever peaceful purpose he desires is one of our greatest legal traditions.

The apparent (and understandable) determination by the Defendants that the present zoning of the Plaintiffs' property should be reduced as to the size and number of units allowed thereon cannot be arbitrarily and confiscatorily imposed upon the Plaintiffs by the simple means of verbal directives forbidding the acceptance of applications for, and the issuance of building the acceptance of applications for, and the issuaance of building permits.

This Court in consideration of the above and being otherwise fully informed in the premises,

IT IS THEREFORE ORDERED AND ADJUDGED that inasmuch as time is of the essence, the Plaintiffs have thirty days from the date hereof to prepare and present to the Defendants are restrained from undertaking the

rezoning from undertaking the rezoning of the subject property belonging to the Plaintiffs from its present classification of RM-54A during the said thirty day period.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiffs' rights under this Order shall terminate at the expiration of thirty days from the date hereof with prejudice, unless otherwise ordered by this, or another Court of Competent jurisdiction.

IT IS FURTHER ORDERED AND ADJUDGED that the rights granted to the Plaintiffs herein are not assignable.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' Petition for declaratory judgment being made moot by the contents of this Order be and the same is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiffs' Petition for injunction being made moot by the contents hereof be and the same is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiffs' Petition for damages against

the Defendants being made moot by the contents hereof be and the same is hereby denied.

DONE AND ORDERED in Chambers, in Clearwater, Pinellas County, Florida, this 27th day of September, 1974.

/s/ David Seth Walker
CIRCUIT JUDGE

APPENDIX IV

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT M. COUF, et al., *

Plaintiffs, *

CASE NO. 74-391 Civ-T-H

-vs- *

KARLEEN DeBLAKER, et al.,*

Defendants. *

ORDER

This action, brought pursuant to 42 USC §§ 1983, 1985, and 1986, was instituted on July 19, 1974, by Plaintiffs Robert M. Couff and Mary Brown who allege that their constitutional rights to due process and equal protection were violated when Defendants Karleen DeBlaker, John F. Rankin, Donald Williams and Joseph L. Carwise, as the City Commissioners of the City of Clearwater, orally declared a moratorium on the issuance of building permits with respect to certain real properties, including Plaintiffs, in June 1974.

Plaintiffs are owners of bayfront property located in the City of Clearwater.

At the time the property was purchased by them, and at all times relevant to this litigation, it was zoned RM-54A which is a high density, multi-family zoning classification allowing construction of 54 dwelling units per acre. In reliance upon this zoning classification, Plaintiff Couf had plans and surveys prepared and acquired engineering licenses and permits for the development of a high-rise apartment building on the property.

On June 3, 1974, and again on June 6, 1974, the Clearwater City Commission met to consider, among other things, the effect of the Pinellas County, Florida, land use plan on city zoning. At the June 6 meeting, Defendant DeBlaker moved to hold a public hearing to consider re-zoning all property located within 500 feet of the waterfront in the City of Clearwater (which included the area in which Plaintiffs' property was situated). Further, she directed the City Building Department not to accept any applica-

tions for building permits in that area pending consideration of the re-zoning proposition. The undisputed evidence presented during the trial of this case demonstrated that the purpose of the Commission's action was to down-zone all waterfront property in the City of Clearwater in an effort to conform city zoning to the overall county land use plan.

Thereafter, on June 10, 1974, Plaintiff Couf made application to Defendant Paul Bergmann, director of planning, for approval of a site plan preliminary to an application for a building permit. It provided for construction of a 17 story condominium apartment building, and the density reflected on the plan was 44 units per acre. At that time Plaintiff was advised that his application would not be accepted. Defendant Edwin Blanton, the building director, also advised Plaintiff that no application for a building permit relating to the property shown in the site plan would be accepted as a result of the City Commission's action.

On July 1, 1974, Defendants H. Everett Hougen, Mayor of the City of Clearwater and Carwise directed Defendants Picot B. Floyd, the city manager, and Bergmann to initiate proceedings to effectuate a change in zoning of certain waterfront property, including Plaintiffs', from RM-54A to RM-24, and instructed Defendants Floyd and Blanton not to accept building permit applications for construction of improvements exceeding the RM-24 zoning density. On July 31, 1974, Plaintiffs filed a petition for writ of mandamus in the Circuit Court of Pinellas County, Florida, requesting that Defendants be directed to issue a site plan approval and all applicable building permits. A final order in that case was entered on September 27, 1974, in which the State Court Judge made the following findings of fact:

> 1. . . . . the crux of the controversy before this Court (the state court) is whether or not the Defendants were unalterably predetermined to deny Plaintiff's application for a building permit under the existing RM-54A zoning

classification. From all that we have seen, read and heard, the Court feels this to be a fact. The evidence and testimony presented by the Plaintiffs in support of their contention that the Defendants were unalterably committed to the denial of their application for a building permit was neither substantially nor successfully rebutted.

2. It is apparent and found to be fact, that the Plaintiffs were given just and persuasive cause to believe that the presentation of an application for a building permit together with the detailed complete building plans as required would be useless and that Defendants had theretofore irrevocably committed themselves to a denial of the Plaintiffs' proposed application.

3. In this case the Plaintiff's land is fairly surrounded by structures which are similar in nature and height to the Plaintiffs' apparent intended improvements. Indeed during the trial of this cause the Defendants admitted that building permits had been issued for a high rise building in excess of ten stories on property less than one hundred yards from that of the Plaintiffs.

4. It is the finding of this Court that the Plaintiffs have materially and substantially altered their position in reliance upon the acquisition of a building permit under the present RM-54A zoning.

5. The Plaintiffs have expended great sums of money, the Plaintiffs have volunteered the charitable

donation of present improvements. on their land which have high historical value, and the Plaintiffs have entered into contractual agreements between themselves in reliance upon the availability of a building permit under the existing RM-54A zoning classification.

6. The Plaintiffs have pursued their intentions openly and in good faith and the Defendants either knew or should have known of those intentions.

The State Court concluded that Defendants had not complied with the procedures outlined in the municipal code in orally declaring a moratorium on the issuance of building permits, and it ordered the Defendants to accept and consider Plaintiff's application for a building permit under the RM-54A zoning classification within thirty (30) days. Further, the Court restrained the Defendants from undertaking the rezoning of Plaintiffs' property during that thirty day period; and having awarded injunctive relief, the Court concluded that Plaintiffs claim for damages was moot. The Defendants appealed, thereby superceding the judgment under applicable Florida Law, and

The Plaintiffs then filed this action in the Federal Court.*

The issue tried before the jury in this case was the Plaintiffs' conspiracy claim under 42 USC §1983. The Court submitted special interrogatories to the jury, and the jury found in favor of Plaintiffs Couf and Development Finance, Inc. and against Defendants DeBlaker, Rankin Williams, Carwise, Hougen and Floyd in the amount of $70,833.33, and in favor of Plaintiff Mary A. Brown and against the same Defendants in the amount of $75,000.00.

The cause is now before the Court upon Defendants' motion for judgment notwithstanding the verdict or in the alternative for new trial.

It is important to note that the issues

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* It was conceded by Plaintiffs that they did not submit an application for a building permit within the thirty day period prescribed by the final order in the state court mandamus proceeding. In fact, Plaintiffs have never applied for a building permit.

raised in this action are very different from those raised in the mandamus proceeding in the state court. In the mandamus proceeding Plaintiffs need only to prove that the defendant officials failed to accept and consider Plaintiffs' building permit application as required by municipal ordinance or state law, or that they did not properly follow the procedures outlined in the applicable law. In this action, however, Plaintiffs must prove a constitutional tort, i.e., that they were deprived of a property right without consitutional due process. It is simply not enough to show that a municipal ordinance was violated. The settled law in this Circuit under 42 USC §1983 is that the only question which the district court may consider in reviewing actions taken by a zoning commissioner is whether such actions are "arbitrary and capricious, having no substantial relation to the general welfare." South Gwinnett Venture v. Pruitt, 491 F2d 5 (5th Cir. 1974). See also Higginbotham

v. Barrett, 473 F.2d 745 (5th Cir. 1973). "The zoning of property, including the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis." Id., 473 F.2nd at 747.

As stated by the State Court Judge, it is clear from the evidence and testimony presented that "Defendants were unalterably predetermined to deny Plaintiffs' application for a building permit under the existing $M-54A zoning classification," and to down-zone the property. It is also clear from the undisputed evidence, however, that the actions taken by the City Commissioners and the remaining defendants, pursuant to the Commissioners' direction, were part of a systematic effort to conform city zoning to the county comprehensive land use plan. No evidence was presented which would suggest that the Commissioners' action was individually

directed toward these particular Plaintiffs in any sense as a vindictive effort to deprive them of their civil rights. Indeed, the State Court Judge also remarked in his findings that the objective of the Defendants was a laudable one from the standpoint of the public interest, covering an entire area of water-front property, not merely the Plaintiffs' parcels. Under these circumstances, therefore, the Court finds that the Defendants' actions (although violative of state law as determined by the state court) were not arbitrary and capricious, but had a rational basis in relation to the general welfare. Accordingly, the Court necessarily concludes as a matter of law that the Complaint in this case does not present a substantial federal question (South Gwinnett Venture v. Pruitt, supra); that the jury's verdict is contrary to the evidence and the law; and that the Defendants are entitled to judgment notwithstanding the verdict.

In addition, and alternatively, the Plaintiffs have proved no damage proximately

resulting from any wrongful action on the part of the Defendants. Assuming that some duty owed to the Plaintiffs was breached by Defendants under state law, federal law or the United States Constitution, that breach was fully remedied by the immediate state court order which enjoined Defendants to accept and consider Plaintiffs' application for a building permit under the existing RM-54A zoning classification. At that point Plaintiffs had been granted all the relief to which they were entitled. Plaintiffs never submitted an application as allowed by that order; and while financial reverses may have thwarted their construction plans at a later time (while the state court decree was superceded on appeal) that circumstance cannot be attributed to Defendants, nor does it explain or excuse Plaintiffs' failure to perfect their rights under the state court decree (subsequently affirmed on appeal) by tendering an application for a permit during the allowed 30 day period following its entry.

Upon full consideration of the motion and memoranda of counsel, and the evidence and testimony presented at trial, the motion of Defendants DeBlaker, Rankin, Williams, Carwise, Hougen, and Floyd for judgment notwithstanding the verdict is GRANTED. Rule 50(b), Fed. R. Civ. P. The judgment entered November 8, 1978, is vacated and the Clerk is directed to enter judgment for Defendants and against Plaintiffs.

In the event the judgment notwithstanding the verdict is vacated or reversed on appeal, the Court will grant Defendants' alternative motion for new trial pursuant to Rule 50(c)(1), Fed. R. Civ. P., on the ground that the verdict is contrary to the manifest weight of the evidence.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 16th day of August, 1979.

/s/ Wm. Terrell Hodges
U. S. DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 1981, three copies of the Appendix to the Petition for Writ of certiorari to the United States Supreme Court were mailed, postage prepaid to Oscar Blasingame and Stephen Chamblis of Greene, Mann, Rowe, Stanton, Mastry, and Burton, P.O. Box 3542, St. Petersburg, Florida 33713, and to Thomas A. Bustin, City Attorney, City of Clearwater, P.O. Box 4748, Clearwater, Florida 33518.

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Supplemental Appendix

81-1053

Office - Supreme Court, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

ROBERT M. COUF,
MARY A. BROWN and
DEVELOPMENT
FINANCE, INC.,

Petitioners,,

v.

KARLEEN DeBLAKER,
JOHN F. RANKIN, DONALD
WILLIAMS, JOSEPH CARWISE,
H. EVERETT HOUGAN and
PICOT B. FLOYD,

Respondents.

SUPPLEMENT
APPENDIX

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APPENDIX I

Testimony of Donald Williams

Q Do you have an interest in any property along the waterfront near that area?

A Yes, I do.

Q Would you tell us what that is?

A That's a retirement hotel. It's approximately two blocks north of that property.

Q That's out close to the waterfront; is that right, sir?

A It's on the waterfront.

Q Within five hundred feet?

A Yes.

Q And how tall is that building?

A That building is -- about fourteen stories.

Q How many units?

A (Pausing) There are two hundred and fifty-six, I believe.

Q Now, at that meeting -- incidentally,

tell us just what your interest is in the building?

A I'm a partner in it.

Q How much -- how much do you own in that building?

A A little over 20 per cent.

APPENDIX II

Testimony of Robert Couf

Q Do you recall who was present of the City officials?

A I certainly do. There was the Mayor, Mayor Everett Hougen; there was Commissioner Carwise; there was Commissioner DeBlaker; there was Commissioner Rankin; Commissioner Williams; Paul Bergmann, the Planning Director; Edwin Blanton, the Building Director; and Picot Floyd, the at that time City Manager.

Q What transpired concerning your particular property at that meeting?

A Well, after an hour or two wait I got up and told them my name, who I was, and went through basically everything I had done for the last year and a half on that particular peice of property, basically reitering the letter that they had all personally received -- what would happen to me, personally, if the property was taken

away and down-zoned.

Q What would happen to you, personally?

A Well, personally, I would be sued. I would lose the --

MR. BLASINGAME: I object to these conclusions, Your Honor.

MR. KINNEY: I'll reframe the question.

THE COURT: All right.

BY MR. KINNEY:

Q What did you tell them would happen to you if it were down-zoned?

A I would lose the money that had been invested to date with the property, with the proposed building. I would lose various commitments that were made from my various banks to finance the property. And I would owe money on a mortgage that I could do nothing with the land with.

Q Would you read that paragraph again until I say "Stop," please?

A You want the whole paragraph; right?

Q Read just Paragraph C.

A "C. Instructed the Building Department not to accept for consideration any applications for building permits on these particular properties" --

Q Stop. Now, the phrase "these particular properties" -- what is that referring to as "these particular properties," sir?

A "These properties," I would assume, refers to --

Q In the document, itself?

A -- the above --

Q Excuse me.

A -- Refers to the paragraph, the above, where there was an instruction to the Department to file re-zoning of spot-zoned areas

lying within five hundred feet of the water-front.

Q So, the "spot-zoned areas"?

A Not currently being used commensurate with zoning to a zoning more commensurate with present usage.

Q Now, that didn't include Mr. Couf's Lots 4 and 5 in that area, did it?

MR, WHITE: Objection, Your Honor. That's leading.

THE COURT: Sustained as to the form of the question.

BY MR. BLASINGAME:

Q Where on that document is the motion that pertains to Mr. Couf's property on Lots 4 and 5? -- If you will look at Page 2? (Indicating)

A I don't see under any of the five motions specific reference to Mr. Couf's property.

Q Okay. The area in which Mr. Couf's property lay, or the class of property?

A That's correct. Not to any property

in the immediate area. It was, rather, the waterfront -- five hundred feet.

Q What do you mean by "that's correct," sir? As to Paragraph C that Mr. White had you read, what do you mean?

A Well, that -- as I see Paragraph C, Paragraph C is addressing in fact Mr. Blakely's property and other spot-zoned properties per Commissioner DeBlaker's motion.

Q All right. Where is Mr. Couf's property included in that document?

A That would be -- on the second page, "Instructed the Planning Department to recommend down-zoning for other areas within five hundred feet of the waterfront" -- that would include the beach -- "having zoning more commensurate with present use, paying immediate attention to environmentally endangered areas as defined by the planners.

APPENDIX IV

Testimony of Robert Couf

Q Did you have any personal contact with any of the members of the Commission or the Mayor regarding your particular property?

A Yes, on a -- on a few occasions.

Q And with whom did you have it?

A Well, the first Commissioner would be Mr. Don Williams.

Q And when did you have any contact with him?

A I had had contact with Mr. Williams a good few months prior to purchasing Mary Brown's piece of property, and in the interim time maybe once or twice as far as just a general conversation is concerned.

Q When would you say that Mr. Williams was aware that you owned Lot 4?

A Oh, Mr. Williams was aware that I owned Lot 4 before I purchased Mary Brown's Lot 5.

Q How did he become aware of it?

A He tried to buy it from me -- or he wanted to buy it from me.

Q When was this?

A Just prior to May 6 of 1974.

APPENDIX V

District Court's Instruction to the Jury

As you heard during the course of the trial, there was a State Court action between the Plaintiffs and the Defendants before the institution of this suit in this Court. The Plaintiff's action in State Court was brought to force the City of Clearwater, and its officers and employees, to accept the Plaintiff's application for a building permit. As a result of that suit, the State Court Judge made certain findings of fact concerning material facts in this case, and those findings are binding and conclusive upon you, that is, you must accept and apply those findings in this case.

APPENDIX VI

Testimony of Edwin Blanton

Q Mr. Blanton, on or around the period of June 6 to June 10 you were instructed by the City Manager, where you not, to not accept any applications for building permits from any owners within five hundred feet of the waterfront; is that correct?

A I don't recall if the City Manager directed me to. I did -- someone from the City Commission meeting came into my office and said the City Commission had just instructed the Building Department not to accept any applications. I can't recall who sent him down there.

Q And did you not, also, on or about, oh, a few months after that date -- or your office, or someone with your office -- accept or give a permit for another high-rise adjacent to Mr. Couf's property?

A There was a permit issued in August, I believe, for a forty-unit building, kind

of catercornered toward the Bay from Mr. Couf's property.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ~~11th~~ 7th day of December, 1981, three copies of the Supplement Appendix to the Petition for Writ of certiorari to the United States Supreme Court were mailed, postage prepaid to Oscar Blasingame and Stephen Chamblis of Green, Mann, Rowe, Stanton, Mastry, and Burton, P. O. Box 3542, St. Petersburg, Florida 33713, and to Thomas A. Bustin, City Attorney, City of Clearwater, P. O. Box 4748, Clearwater, Florida 33518

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CLERK

No. 81-1053

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT M. COUF,
MARY A. BROWN and
DEVELOPMENT
FINANCE, INC.,

Petitioners,

v.

KARLEEN DeBLAKER,
JOHN F. RANKIN, DONALD
WILLIAMS, JOSEPH CARWISE,
H. EVERETT HOUGAN and
PICOT B. FLOYD,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Respondents rely upon the statement of the case and facts as presented in the text of the appellate court's decision, Couf vs. DeBlaker, 652 F.2d 585 (5th Cir. 1981). (APP1-26)

In this brief the following abbreviations will be used:

(APP) - Petitioners' Appendix

ARGUMENT FOR DENIAL OF WRIT

The first point presented by Petitioners in support of their argument that certiorari should be granted is that the Fifth Circuit's Couf decision decides the questions of collateral estoppel and res judicata in a manner conflicting with Allen vs. McCurry, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

While the Allen case decides several questions of import, it's only relevance to the case at bar is found in its holding that collateral estoppel and res judicata apply when a §1983 Plaintiff attempts to relitigate in federal court issues decided in state court actions. The Couf opinion does not disagree with this principle of law. In fact, the Couf decision specifically cited the recent Allen opinion and correctly extracted the controlling rule of law from that

case. (APP 18)

The Couf opinion points out, however, as did the trial court in the Order Granting Judgment n. o. v. (App 49-50), that the issues presented in the mandamus hearing were materially different from those raised in the federal civil rights action. In the mandamus action the only issue presented was whether the Respondents had failed to perform a ministerial duty respecting the issuance of a building permit to Petitioners. The state judge held that they did and ordered that Petitioners be allowed to apply for a building permit within thirty days of the order. Petitioners never made such application.

Both the trial judge and the court of appeals recognized that certain findings of the mandamus order were applicable to the federal action and both courts

cited from the mandamus ruling in their opinions. The two courts would not, however, go as far as Petitioners would urge and apply a blanket res judicata effect to the mandamus order. The issues and applicable law, said the courts, simply were not the same in both actions.

For examples of cases where the courts have recognized that state adjudications act as res judicata and collateral estoppel in §1983 actions only where the state actions reflected the federal issues, see Laverne vs. Corning, 522 F. 2d 1144 (2nd Cir. 1975); Crow vs. Brown, 332 F.Supp. 382 (N.D. Ga. 1971) affirmed 457 F.2d 788 (5th Cir. 1972). These cases and the decision under review are not out of line with the Allen decision which itself set forth the well settled law that there must be similarity of issues before res judicata and collater-

al estoppel will operate. Allen, 66 L.Ed.2d at p.313.

Since there is no direct conflict between the Couf decision and Allen, Petitioners' first point should be denied as a basis for issuing a writ of certiorari.

Petitioners next assert that certiorari should be granted because the Couf opinion decides an important question of state law in conflict with applicable state law. The Couf decision, say Petitioners, refers to the act of a local zoning board as legislative in nature in contravention to Andover Development Corp. vs. City of New Smyrna Beach, 328 So.2d 231 (Fla. 1st DCA 1976). It should be emphasized that the Couf decision did not go so far as to hold that there is an absolute immunity from §1983 relief for legislative-zoning actions. Instead,

the court restated its well settled holding that the actions of a local zoning commission will be reviewed by judicial courts only to consider if those acts were arbitrary and capricious, having no substantial relation to the general welfare. (APP 22-23)

Regardless of the context in which the statement was made, the consideration of whether the decisions of a local zoning board are legislative, administrative, or somewhere in between is hardly an "important" question of state law. Further, this characterization of local zoning activities was in no way despositive of this case either in the trial court or on appeal.

Actually, the issue of whether a local zoning board is legislating is probably not a state question at all in a §1983 action. A federal court enforc-

ing federal rights by way of a §1983 action should be free to place its own characterization on the acts of a zoning board. This is a matter of federal not state law. Qualls vs. Parrish, 534 F.2d 690 (6th Cir. 1976); Fidtler vs. Rundel, 497 F.2d 794 (3rd Cir. 1974).

This lack of a state question in the first instance, coupled with the relative unimportance of the question in general and as applied to this case, should result in a denial of point two as a basis for issuing a writ of certiorari.

The third point raised by Petitioners seeking to invoke this Court's certiorari jurisdiction is that there was sufficient evidence presented to sustain the §1983 action and, therefor, the challenged opinion should not have affirmed the trial judge. In short, Petitioners would have this Court analyze, reweigh, and recon-

sider the evidence presented in three days of trial and, further, second guess the trial court in his analysis of the evidence and his choice of applicable law. The Fifth Circuit Court of Appeals has already undertaken this monumental task.

At pages 20-23 of the petition, Petitioners reargue their case. All of the evidence cited on these pages has been considered at length by two prior written opinions. A careful reading of those opinions (APP 1-26;43-54) should rebutt, distinguish and refute Petitioners' arguments concerning this evidence.

It is clear the Petitioners are not concerned with important issues of law but, instead, with the facts of their particular case. These facts are not likely to arise again and are of interest only to these parties. If this Court

issues a writ of certiorari it will be necessary to review a lengthy appellate record to determine if Respondents' actions, as Petitioners claim, constituted a conspiracy, were arbitrary and capricious, violated due process, etc. These questions have been twice resolved in favor of Respondents. Even if this Court were to disagree with the two lower decisions, it would be on the basis of the Court's factual interpretation.

This Court has not in the past used its discretionary writ of certiorari as a means of providing another bite at the apple for a party who has previously been afforded a fair and sufficent hearing in both the trial and appellate courts. Petitioners have demonstrated no important reasons why this Court should become just one more appellate tribunal. Petitioners are understandably disap-

pointed with their prior results but they have not demonstrated any factors making this case important enough to require intervention by this Honorable Court.

CONCLUSION

In light of the foregoing argument and authorities, it is respectfully submitted that Petitioners have not demonstrated important reasons for invoking the discretionary writ of certiorari. The decision of the court of appeals is well reasoned and well supported by authority as is the judgment n. o. v. For this reason, it is respectfully submitted that this Honorable Court should refrain from issuing a writ of certiorari in this instance.

Respectfully submitted,

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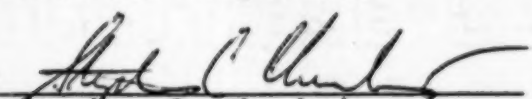
By 
Stephen C. Chumbris

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December, 1981, three copies of the Respondents' Answer Brief to Petition for a Writ of Certiorari were mailed, postage prepaid, to James G. MaHorner, 107 South Bronough Street, Tallahassee, Florida, 32301.

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